

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1474

To be argued by
LEE S. RICHARDS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1474

UNITED STATES OF AMERICA,

—v.—

NORMAN STANLEY CALDWELL, a/k/a "Alah
Masha," a/k/a "Sha," and ERNEST GEORGE
TEPPER, a/k/a "Born Freedom,"

Defendants-Appellants.

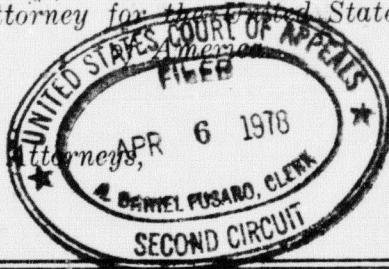
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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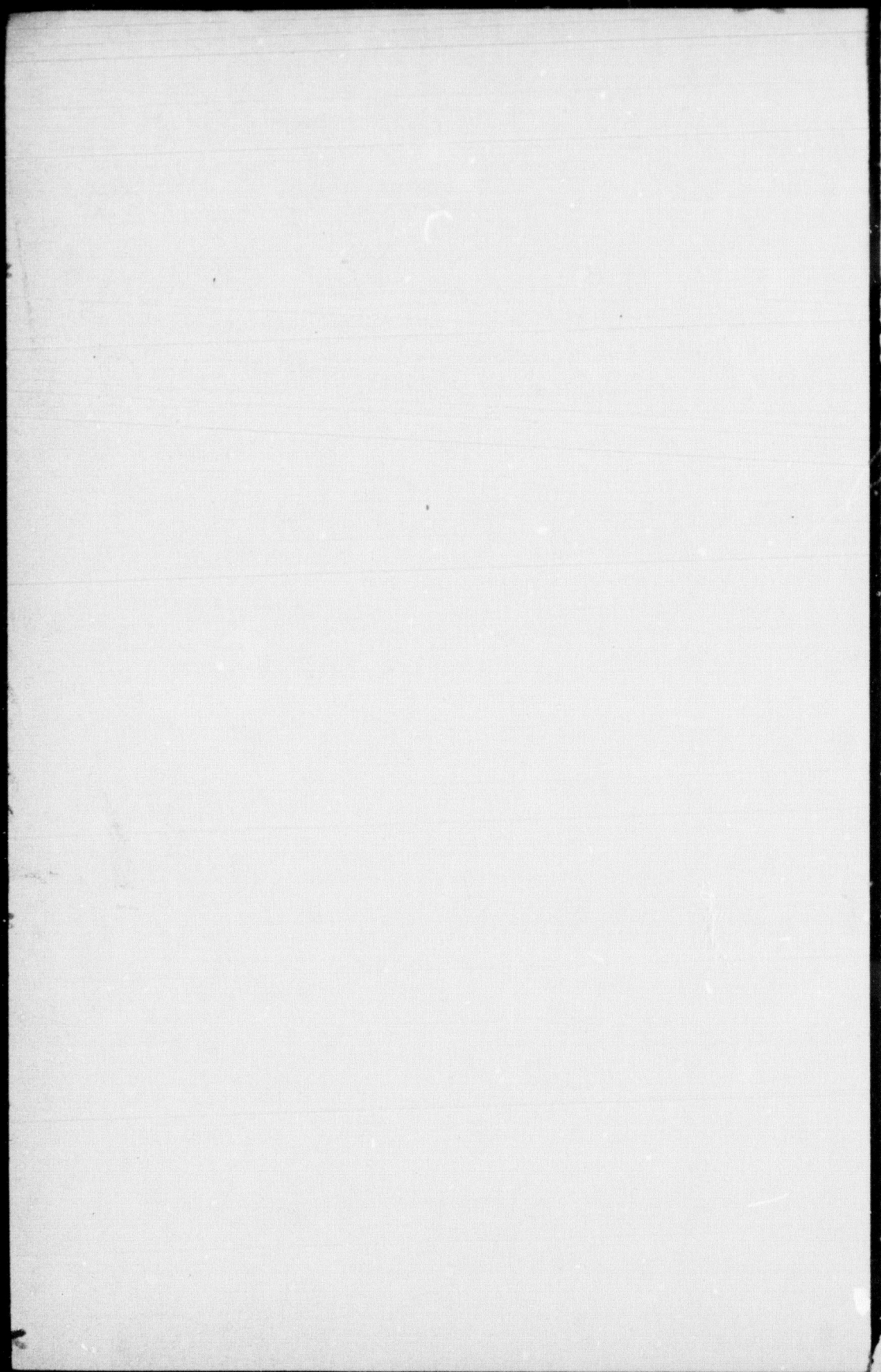


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Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Norman Stanley Caldwell and Ernest George Tepper appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on November 14, 1977, following a four day jury trial before the Honorable Charles H. Tenney, United States District Judge.

The original indictment, 77 Cr. 517, filed on July 8, 1977 charged Caldwell, Tepper, and another defendant, Ivan Keith Bonner, with conspiracy to commit bank robbery in violation of Title 18, United States Code, Section 371. A superseding indictment was filed on September 6, 1977 adding a second count charging all

three defendants with attempted bank robbery in violation of Title 18, United States Cr⁷ Sections 2113(a) and 2.

The defendants Caldwell and Tepper were tried together starting on September 26, 1977 and both defendants were found guilty on both counts on October 3, 1977. During the course of their trial Bonner was sentenced to six months in jail for contempt in refusing to testify under a grant of immunity. (Tr. 316-24).*

On November 14, 1977 both Caldwell and Tepper were sentenced under the Youth Corrections Act, Title 18 United States Code, Section 5010(b) on both counts, the sentences to run concurrently.

Caldwell has been in custody since November 14, 1977 serving his sentence and Tepper surrendered in January of this year to begin serving his sentence.

Statement of Facts

Synopsis

On June 30, 1977 Norman Stanley Caldwell, Ernest George Tepper and Ivan Keith Bonner drove in Tepper's car to the area of the European American Bank, 433 Broadway, New York, New York in order to rob the

* Bonner was tried separately on Indictments 77 Cr. 517 in September, 1977. On September 23, 1977 he was convicted of the conspiracy count. After the jury announced its vote on the other count, Judge Tenney declared a mistrial on that count. On October 18, 1977 Bonner pled guilty to the second count, reserving his right to file for collateral relief should his co-defendants gain reversal on their convictions. He was subsequently sentenced under the Youth Corrections Act, Title 18 U.S.C. Section 5010(b) on both counts, the sentences to run concurrently. Bonner has not filed an appeal.

bank. They came equipped with a loaded handgun, surgical gloves and stocking masks and they spent several hours reconnoitering the bank and its environs, first from the car and then on foot. On several occasions Caldwell and Bonner walked to the bank as Tepper waited behind the wheel of his car. Caldwell and Bonner each went into the bank separately.

After a number of plainclothes policemen converged on the area of the bank Bonner and Caldwell left the loading platform from where they had viewed the bank and walked back to the car and Tepper. When they saw Tepper being held by the police they fled into a hardware store where they were arrested.

The Proof At Trial

1. The Government's Case

A. The Attempted Bank Robbery

In the early morning of June 30, 1977 Ernest George Tepper, Norman Stanley Caldwell and Ivan Keith Bonner met near a public school in Queens, New York. (Tr. 648).^{*} They drove to Manhattan and spent several hours driving around and parking near (but just out of sight of) the European American Bank at 433 Broadway, New York, New York. (Tr. 31 *et seq.*, 63, 303-04; GX 1). The testimony of a number of civilian witnesses showed that they spent a considerable amount of time conferring in the car just around the corner from the bank. (Tr. 32, 95).

^{*} "Tr." citations refer to pages of the trial transcript. "Hr." citations refer to pages of the Tepper suppression hearing. "GX." refers to Government exhibits and "DX." refers to Defense exhibits. "SA." refers to pages in the Defendants' Supplementary Appendix.

The three were noticed in the car by several employees of a fabric warehouse at the corner of Howard and Mercer Streets, a block west of the bank. (Tr. 31 *et seq.*; 92 *et seq.*). These citizens noticed the car because it looked like their employer's car and also like a car which had been used in a previous robbery of the same bank months before. (Tr. 37 *et seq.*, 93 *et seq.*).* While parked, Bonner and Caldwell left the car and each were seen entering the bank. They were described by their clothing, complexions and build,** but were not identified in Court by anyone but the bank manager. (Tr. 164-69, 220-33, 258-67, 284-924; GX 2, 3).*** Bonner walked into the bank first, and asked for change for a bus. (Tr. 164-5, 221-22). After receiving the change Bonner left the bank. (Tr. 166, 222). Caldwell then entered the bank and walked slowly toward the convenience counter where the bank guard stood. (Tr. 166-68, 223-25, 259, 285-87). While in the bank Caldwell examined the activities of the bank,

* The Government offered testimony about this last reason for recognizing the car solely to explain the witnesses' conduct, not as a similar act, (Tr. 772) and the trial court charged the jury to this effect several times. (Tr. 38, 333, 807).

** When arrested, Bonner was wearing, among other things, a dark shirt, sweater, and pants and a black hat. (Tr. 414, 624; GX. 2, 15, 16). The first man who entered the bank was uniformly described as wearing those clothes and was later viewed by bank employees sitting across from the bank in a position where he was seen by the policeman who arrested Bonner and Caldwell (Tr. 165, 221, 263, 284). When arrested, Caldwell was wearing a tan jacket, blue short, dark pants and a blue hat. (Tr. 414-15; GX. 3, 12, 13, 22F). The second man who entered the bank was described as wearing those clothes and was later seen by bank employees sitting with Bonner across from the bank where he too was first placed under surveillance. (Tr. 167-68, 224-25, 258-60, 285).

*** The bank manager identified Caldwell as the first man who came into the bank, though he had previously identified Caldwell's picture (from a photo spread) as the second man. (Tr. 168, 215-17; GX. 22f). During Leavy's testimony and in summation, Caldwell's attorney acknowledged that Caldwell went into the bank and that he was with Bonner. (Tr. 212-13).

and the guard and he took a deposit ticket from the counter. (Tr. 223, 259, 285-87). When asked if he needed any help, Caldwell mumbled something and left the bank. (Tr. 166).

None of the three defendants had an account with the European-American Bank. (Tr. 233-35). Though Caldwell later told F.B.I. agents he went into the bank to see about an educational loan and though he said he actually talked with the manager about such a loan, each of the bank employees denied having any such discussion with either of the two men. (Tr. 179, 235, 267, 649). Of course, Bonner had no need for change for a bus.

The three defendants were next seen in Tepper's car on Mercer Street, north of Howard Street and just out of sight of the bank. (Tr. 31-36, 169-70, 172). They were seen there by the bank manager and by Reginald Hassell, an employee for a fabric warehouse near the targeted bank. Hassell first noticed the car on Mercer Street about ten o'clock in the morning and he testified that he later saw them parked south of Howard Street. This was the third time in well over an hour in which he had seen the car. (Tr. 31-37). After a discussion with his fellow employees in which they all decided the car looked like the car used in a previous robbery of the European American Bank, Hassell called the police emergency number and a fellow employee, Jennifer Cheong, went out to get the car's license number. (Tr. 37-42, 92-103; GX. 1, 6). From the office in the fabric warehouse, Hassell saw Bonner and Caldwell get out of the car and walk toward the bank. (Tr. 37; GX. 1). As Cheong returned to the office, Bonner and Caldwell were walking back to Tepper's car. (Tr. 43, 100). Cheong and Hassell saw yellow gloves on Caldwell's hands and both described Bonner as walking as if he had something under his sweater. (Tr. 44, 101; GX. 1, 5). The tapes of the calls Hassell and Cheong made to the police emergency number indicated that these eyewitnesses thought Bonner was carrying a gun, possibly a shotgun, under his sweater.

(GX 1). In Hassell's second call he gave the police the license number of the car and told them about his suspicion about the presence of a gun. (Tr 45; GX 1). At the time of that second call Tepper, Caldwell and Bonner pulled off in Tepper's car and Hassell reported that to police as well. (Tr. 45, 49; GX 1).

The three defendants in Tepper's car returned to the same spot on Mercer Street and Bonner and Caldwell got out and walked up toward the bank yet another time. (Tr. 49-50, 103). Tepper remained in the getaway car. Meanwhile, Hassell had gone up to the bank to warn bank employees about a possible robbery and he saw Bonner and Caldwell as he walked back to his office. (Tr. 49). Cheong called the police emergency number, telling the police of the defendants' return to the bank and again of her suspicion that they possessed a gun. (Tr. 103; GX 1).

B. Tepper's Arrest

Responding to the three calls to the police emergency number, four policemen from the Anti-Crime Unit of the First Precinct drove into the block in front of the fabric warehouse. (Tr. 51, 327-29, 379-81, 578-79). Seeing Tepper alone in the car, with the motor running, the police asked Tepper for his license and registration. (Tr. 381-83, 579-80). One of the police officers went into the fabric warehouse to speak with Hassell and Cheong and they confirmed the fact that the car was similar to one used in a previous robbery and that the witnesses thought Bonner and Caldwell had a gun. (Tr. 334). When Sergeant Peters was told that certain eyewitnesses believed the occupants of the car had a gun, and that the car was similar to one used in another robbery, Sergeant Peters ordered two of the police officers to hold Tepper and to look under the seat of his car. (Tr. 580-81). One of the officers found an empty holster under the front seat on the passenger's side. (Tr. 386, 581; GX 10).

Later, as one of the defendants was being put in Tepper's car to be taken to the police station house another police officer found a pair of yellow surgical gloves on the floor behind the back seat. (Tr. 626; GX 5).

C. The Arrest of Caldwell and Bonner

While the police were approaching the getaway car, Caldwell and Bonner were walking alongside the bank toward the front door. (Tr. 231-32). Upon seeing Caldwell and Bonner, the bank's assistant manager ordered that the front door to the bank be locked and it was. (Tr. 232). Since they were unable to get into the bank, Caldwell and Bonner retreated from the bank area to a loading platform across from the bank. (Tr. 291, 414). A group of police officers from a different squad arrived and one went into the bank to tell the manager that it was alright to unlock the doors. (Tr. 410-13). At first, three of the officers (all dressed in suits or sport jackets) stood in a doorway down Howard Street from Bonner and Caldwell. (Tr. 417, 479). Then one crossed the street into a stationery store. (Tr. 417, 480).

Shortly thereafter Sergeant Peters, who had ordered the arrest of Tepper, was seen at the end of Howard Street near the fabric warehouse. His handcuffs could be seen by other policemen a block away, near where the defendants were sitting. (Tr. 480, 585). One of those police officers went down the block to tell Peters to get out of sight. (Tr. 480-81, 585).

After the arrival of these four or five plainclothes police officers, Caldwell and Bonner got up from the platform and started walking away from the police on Howard Street. (Tr. 418, 586). They walked down Broadway, west on Canal Street to Mercer Street, where Tepper's car was parked and where a crowd had formed. (Tr. 418-20). They looked up Mercer Street and, seeing

Tepper being held by police, ducked quickly into a hardware store on the corner. (Tr. 420, 585).

In the hardware store they were arrested. (Tr. 421 *et seq.*). The police officer who first followed them into the store yelled "hey" and, with that, Bonner turned into an aisle and the officer heard a heavy metallic sound. (Tr. 421). An automatic pistol with six bullets was shortly thereafter found at the bottom of a stairway in that aisle. (Tr. 422-3; GX 9 and 10). Caldwell and Bonner were both wearing a rolled up pair of woman's hosiery under the hats on their heads. (Tr. 426, 624-26; GX 7). Bonner was wearing a second pair of yellow surgical gloves. (Tr. 425, 623; GX 5).

D. Tepper's and Caldwell's Post Arrest Statements

As he was being driven to the police station house, Tepper overheard Sergeant Peters ask another officer whether the initial radio call they had received mentioned a previous bank robbery. (Tr. 571). Hearing this Tepper said, "You blew your case, man. You blew your case."

Later, at F.B.I. headquarters Tepper, after being advised of his rights, first denied any knowledge of the gun, the gloves, the hosiery or any plan to rob the bank. (Tr. 512). He did acknowledge that he had been with Bonner and Caldwell that day. (Tr. 511). However, later in the interview he said he went to the bank to rob it by himself. (Tr. 512). When the interviewing agent indicated his lack of belief of this assertion, Tepper declared, "Okay, you got me, man. Make your case." (Tr. 513).*

* In pre-trial motions, Tepper moved to suppress these statements and those motions were denied. He does not raise that portion of his suppression motions.

The following day in an interview with an Assistant United States Attorney, Tepper again denied any plan on his part to rob the bank but admitted knowing that one of his companions had a gun. He said "Everybody in New York has a gun." (Tr. 657).

In his interview at F.B.I. headquarters, Caldwell said that when the three drove into lower Manhattan Bonner asked that the car be stopped "to check something out" but Caldwell didn't know why. (Tr. 648). He acknowledged that he went into the bank but claimed that he did so to see about a student loan. (Tr. 649, 653). He claimed to have spoken to a bank employee about such a loan. The bank employees all testified that they had no such discussion and one employee testified that the bank offers no material on such loans. (Tr. 179, 237, 267, 279). The loan brochures offered into evidence by Caldwell also reveal that no such loan material was available. (DX. A).

2. The Defendants' Case

Aside from the loan brochures and deposit and withdrawal tickets available at the bank (DX. A and B) Caldwell offered no other evidence.

The defendant Tepper called a lawyer who handled a trust fund for him and two bank employees from banks where Tepper had accounts. They testified that in the trust fund and various bank accounts and certificates of deposit Tepper had well over \$50,000, some of which was not immediately available to him for withdrawal. (Tr. 678-94).

A R G U M E N T

POINT I

**The District Court Properly Charged The Jury On
The Issue Of Attempted Bank Robbery.**

The defendants contend that the trial court's charge on attempted bank robbery was insufficient. Though they acknowledge that the charge was in accordance with this Court's rulings in *United States v. Stallworth*, 543 F.2d 1038 (1976) and *United States v. Jackson*, 560 F.2d 112 (1977), they claim that the District Court committed reversible error in denying their request that the jury be instructed that to find an attempt they must find that without interruption from an outside source the crime intended would have occurred. Judge Tenney's instructions were entirely proper and the requested additional instruction has been specifically rejected by this Court in *United States v. Jackson*, *supra*.

In both *Stallworth* and *Jackson* this Court adopted the two-tier test for attempt liability set out in the *Model Penal Code* § 5.01 (Proposed Official Draft 1962) and *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975):

"First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting.

. . .

Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent." *United*

States v. Jackson, supra, 560 F.2d at 116 quoting *United States v. Mandujano, supra*, 499 F.2d at 376.

Judge Tenney's charge was patterned after the above quoted language from *United States v. Jackson*, and it fully explained the elements of the offense of attempted bank robbery. Judge Tenney instructed the jury that to convict they must find that the defendant "specifically intended to take and had the criminal purpose of taking money" from the bank (Tr. 796-7), that he acted "unlawfully, knowingly, and wilfully" (Tr. 797, 800-01), and that he "took a substantial step or substantial steps in furtherance of his criminal purpose, which strongly corroborates or supports that purpose." (Tr. 797, 799-800). With respect to the latter element he charged that:

"... The fourth element you must find beyond a reasonable doubt in order to convict is that the defendant took a substantial step or substantial steps in a course of conduct designed to accomplish the criminal result of robbing the bank, and that such step or steps strongly corroborate or tend to prove the criminal purpose of robbing the bank.

"Merely preparing to do something is not an attempt. The step or steps must be substantial and purposeful, and not reasonably explainable except as steps toward accomplishing the crime. A step itself need not constitute an illegal act, but you must find it was taken in furtherance of an illegal purpose." (Tr. 799).

Since the jury instruction given by Judge Tenney fully and correctly informed the jury as to what they must find in order to convict a defendant for attempted bank robbery, there could be no error in his failing to give

the precise charge requested by the defendants. Moreover, the request properly was denied because it contained a formulation of the law on attempt which specifically was rejected by this Court in *United States v. Jackson*, *supra*, 560 F.2d at 119, and by the Model Penal Code draftsmen.

The defendants requested the following charge:

The substantial step must be strongly corroborative of the firmness of the defendant's intent. The substantial step or steps must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some external factors not part of defendant's original plan. *United States v. Mandujano*, 499 F.2d 370, 378 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975) see, *United States v. Jackson*, 560 F.2d 112, slip op. 4804, 4822 (2d Cir. July 19, 1975).

"Preparation to commit a crime is not sufficient to constitute a substantial step."

Included among the formulations which this Circuit in *Jackson*, the Fifth Circuit in *Mandujano* and the Code draftsmen have abandoned are "the dangerous proximity doctrine", the "res ipsa loquitor or unequivocality" test, and a test this Circuit and the draftsmen have called the "probable desistance test." The last of these formulations, according to the Courts and Code draftsmen, defined attempt as "conduct . . . [which], in the ordinary and natural course of events, without interruption from an outside source, . . . will result in the crime intended." *United States v. Jackson*, *supra*, 560 F.2d at 119; *United States v. Mandujano*, *supra*, 499 F.2d at 373 n. 5 (5th Cir.

1974);* *Model Penal Code* § 5.01, Comment at 47 (Tent. Draft No. 10, 1960). In substance that is precisely the charge the defendants requested, and Judge Tenney refused to give. In analyzing this formulation of attempt urged by the defendants the Code draftsmen concluded that it did not "provide a workable standard." They went on to observe:

"... in actual operation the probable desistance test is linked entirely to the nearness of the actor's conduct to completion, this being the sole basis of unsubstantial judicial appraisals of the probabilities of desistance. The test as applied appears to be little more than the physical proximity approach." *Model Penal Code* § 5.01 at 43 (Tentative Draft No. 10, 1960).

The draftsmen also concluded that the "physical proximity doctrine" does not provide much guidance in answering the crucial problem of "how close is close enough for attempt liability." Tentative Draft *supra* at 39-40. This analysis was unequivocally adopted in *Jackson, supra*, 560 F.2d at 117-120.

Accordingly, rather than implicity requiring the holding the defendants seek, this Circuit and the Fifth Cir-

* Caldwell and Tepper rely on *United States v. Mandujano, supra*, to support their request. There, though the *Mandujano* Court found that a charge such as that sought here was "compatible" with its formulation, it did not adopt that charge. Instead, it chose the two-tier test adopted by the Model Penal Code, this Circuit and Judge Tenney. *Id* at 376. It is also interesting that defendants rely on *United States v. Bussey*, 507 F.2d 1096, 1097 (9th Cir. 1974), in which the Court adopted the broader definition of an attempt as "an act tending toward accomplishment, and done in part execution of the design to commit a crime, exceeding an intent but falling short of an execution of it." Indeed, none of the cases defendants cite stand for the proposition they urge, *i.e.* that Judge Tenney was required to give their requested instruction.

cuit in *Mandujano* have explicitly rejected that holding. The language of *Jackson*, *Stallworth* and *Mandujano* makes plain that the two-tier test followed by Judge Tenney is the accepted law on attempt and that it encompasses whatever legitimate concepts were articulated by the defendants' requests.

POINT II

The Evidence Was More Than Sufficient To Support The Jury's Guilty Verdicts.

Tepper and Caldwell claim that the evidence was insufficient to support the guilty verdicts for attempted bank robbery and conspiracy to commit bank robbery. Viewing the evidence in the light most favorable to the Government, *United States v. Glasser*, 315 U.S. 60, 80 (1942); *United States v. Amrep*, 545 F.2d 797 (2d Cir. 1976), the defendants' insufficiency claims are without merit.

A. The Attempt Charge

Relying on this Court's decisions in *United States v. Jackson*, *supra*, and *United States v. Stallworth*, *supra*, Caldwell and Tepper argue that there was insufficient evidence of attempted bank robbery. They also contend that Judge Tenney should have set aside the verdict on the ground that the only proof of the defendants' criminal purpose was the substantial steps taken to commit the crime. Their assessment of the evidence and their reading of the law on attempt is erroneous.

The evidence at trial showed that Tepper, Caldwell and Bonner drove into lower Manhattan on June 30, 1977 equipped with an automatic pistol, a clip of six bullets, a holster, two pairs of surgical gloves, hats whose brims

covered their eyes and, in the case of Caldwell and Bonner, stocking masks. They drove around the area of the bank, conferred for several hours and on two occasions they examined the interior of the bank. As Caldwell and Bonner inspected the interior and immediate environs of the bank Tepper sat in his car in the best location for a rapid get-away. On at least the last such occasion he left the motor running.

When arrested Tepper acknowledged his guilt by twice referring to the "case" against him (once on the way to the First Precinct and again at F.B.I. Headquarters) and by facetiously claiming to have gone to the bank to rob it by himself. When interviewed by an Assistant United States Attorney he retracted his previous claim of ignorance about the gun that he and his two accomplices brought to the bank but offered the lame excuse that everyone in New York carries a gun.

When Caldwell saw that Tepper was being held by police Caldwell fled into a hardware store with Bonner, who promptly attempted to hide the most incriminating evidence of their plan to rob the bank—the gun. When he was questioned by the F.B.I., Caldwell claimed he'd gone into the bank to see someone about a student loan. That statement was proven false by each of the bank employees.

Caldwell seeks to avoid the weight of this evidence which provided a more than sufficient basis to support the guilty verdicts, by advancing two rather novel arguments. First he argues that as a matter of law he should be acquitted of attempted bank robbery because he was arrested while walking away from the bank.* There is

* The defendants make this argument despite the fact that at trial they each explicitly disavowed any claim of abandonment. In light of this disavowal, the Government's request on abandonment was mooted. (Tr. 249-50).

no legal support for Caldwell's position that his walking away from the bank negated any criminal purpose as a matter of law. Caldwell was entitled to argue this fact to the jury. Moreover, his argument ignores the fact that Caldwell decided at the last minute not to rob the bank because of the extensive police presence in the area of the bank. The evidence clearly showed that Sergeant Peters was seen at the end of the block by another police officer and immediately identified as a police officer because his handcuffs were showing. Moreover, all of the Major Case squad officers who were in the block were wearing suits or sport coats and ties and they all criss-crossed the street a number of times. It was only after this obvious police activity that Bonner and Caldwell walked down Broadway, away from the bank and away from the police. Their route was not the most direct route back to the car or the route they had used at least twice during the past several hours.*

Second, Caldwell contends that the Government's case was insufficient as a matter of law because there was no direct evidence of intent, and that the Government cannot rely on the evidence showing the substantial steps taken towards the commission of the crime as evidence of criminal purpose. Caldwell would have this Court rule that criminal purpose or intent can never be established circumstantially in an attempt case; that, under *Jackson* and *Stallworth*, criminal purpose can only be established through insider testimony or confessions. Nothing in any of the cases or the Model Penal Code and its comments supports the proposition defendants proffer, nor does logic. Indeed, it has always been the law that proof of state of mind must of necessity be proven by circumstantial evidence, *i.e.* evidence of the defendant's actions.

* Since Tepper remained in the getaway car he cannot possibly claim that Caldwell's and Bonner's walking away from the bank negates Tepper's criminal purpose.

United States v. Natelli, 527 F.2d 311, 318 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *United States v. Kelley*, 186 F.2d 598, 602-3 (7th Cir.), *cert. denied*, 341 U.S. 954 (1951); *United States v. Platt*, 182 F.2d 469, 471 (2d Cir. 1950); *Paschen v. United States*, 70 F.2d 491, 498 (7th Cir. 1934).

Furthermore, neither logic nor precedent supports Caldwell's extravagant claim that the evidence of the substantial steps taken by the defendants towards the commission of the crime cannot be used to prove defendant's criminal purpose. The law on attempt does not require that an attempt case be dismissed where, as here, the best evidence of the attempt are the steps or acts of the defendants themselves; where one set of substantial steps (e.g. the possession of the materials for the robbery) corroborates another set of substantial steps (e.g. the extensive reconnoitering). Nothing in *United States v. Jackson*, *supra*, or *United States v. Stallworth*, *supra*, supports defendants' novel contention, and the general case law on attempt does not require evidence independent of substantial steps to prove criminal intent. See, e.g., *United States v. Casper*, 541 F.2d 1275, 1276-77 & n.5 (8th Cir. 1976); *United States v. Mandujano*, *supra*; *Rumfelt v. United States*, 445 F.2d 134 (7th Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States v. Coplon*, 185 F.2d 629, 631-633 (2d Cir. 1950).*

B. The Conspiracy Conviction

Tepper and Caldwell also argue that their convictions on the conspiracy count were not supported by sufficient evidence. They argue that the Government's case was

* In fact, the Government adduced ample evidence of criminal intent independent of the substantial steps that were proven. The false exculpatory statements of Tepper and Caldwell clearly show their guilty purpose, as does the flight of Caldwell and Bonner into the hardware store and Bonner's attempt to discard the gun.

improperly based on a series of inferences and did not establish what kind of agreement was reached.

The facts which we have discussed in our "Statement of Facts," see *infra* at p. 2, and in the preceding section on the sufficiency of the evidence to support the attempted bank robbery charge also conclusively demonstrate Tepper's and Caldwell's guilt of the conspiracy charge. The defendants' plan to rob the bank is dramatically demonstrated by the equipment they gathered and by the actions and precautions they took in setting up the robbery, as well as the flight of Caldwell and Bonner into the hardware store and the post-arrest statements of each defendant. The fact that the evidence of Caldwell's and Tepper's knowledge of and participation in the conspiracy was admittedly circumstantial in no way renders it inadequate. See *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Lefkowitz*, 284 F.2d 310, 315-16 (2d Cir. 1960).*

In sum, "giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact," ** the evidence is clearly sufficient to support the conclusion that, when the police arrived, Caldwell was in the process of carrying out a plan to rob the bank and Tepper was waiting to make good his, Caldwell's and Bonner's getaway.

* It is worth noting that neither defendant objected to Judge Tenney's careful charge on conspiracy. See *Nye & Nissen v. United States*, *supra*, 336 U.S. at 619.

** See *United States v. Stirling*, Dkt. Nos. 77-1140, slip. op. 1401, 1434 (2d Cir. February 2, 1978); *United States v. DeGarcas*, 518 F.2d 1156, 1159 (2d Cir. 1975); *United States v. Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972).

POINT III

The District Court Correctly Denied Defendant Tepper's Suppression Motions.

Tepper contends that the District Court committed reversible error in denying his motion to suppress evidence seized during a search of his car at the scene of his arrest.* Tepper claims that the search of his car was unjustified because the police lacked probable cause. After a suppression hearing Judge Tenney denied the motion to suppress finding that the police had probable cause to arrest Tepper and to search the automobile. (Hr. 226 *et seq.*). Judge Tenney's decision was correct.**

The proof in pre-trial hearings showed that members of the First Precinct's Anti-Crime Unit were advised by radio of the reports Hassell and Cheong made to the police emergency number. (Hr. 10, 91-92; Tr. 51, 327, 379, 578; GX 1). They were told that a car possibly used in a previous robbery was seen at Mercer and Howard Streets and they were given a Virginia license number and description for that car. (Hr. 10, 12, 91-2; Tr. 327). When they arrived at the scene, Tepper was sit-

* On the scene, one police officer found an empty gun holster (GX 10) and another found one pair of yellow surgical gloves. (GX 5). Fingerprints were taken from the car after it was taken to F.B.I. headquarters.

** Judge Tenney ruled that the police officers had probable cause to search the car, that it was impracticable to obtain a warrant, and that the search was incident to a lawful arrest. *United States v. Norman Stanley Caldwell, et al.*, 77 Cr. 517 (S.D.N.Y. September 20, 1977); (Hr. 226). The factual findings made by Judge Tenney are entitled to great weight and must be upheld unless "clearly erroneous." See *United States v. Wiener*, 534 F.2d 15, 17 (2d Cir.), *cert. denied*, 429 U.S. 820 (1976); *United States v. DeLeon*, 561 F.2d 421, 423 (2d Cir. 1977).

ting by himself in a car that met the description given to the police. (Tr. 334). The motor was running. (Tr. 381-83, 579-80).

The police approached Tepper and asked him for his license and registration.* (Hr. 12). Meanwhile, one officer spoke with the eyewitnesses Hassell and Cheong, and verified the information the police already had received. The police also learned that Cheong and Hassell had seen Bonner and Caldwell get out of the car and walk up to the bank and had seen one of the defendants carrying a gun and wearing gloves.** (Hr. 92-94). When Sergeant Peters was given this information he instructed two officers to hold Tepper and search under the front seat of his car. (Hr. 16). One officer put Tepper in handcuffs and held him a few feet from the car. (H. 129). The other officer found an empty holster under the passenger side of the front seat just after Tepper was handcuffed. (Hr. 129; GX 10).***

Minutes after Tepper was placed in handcuffs, Bonner and Caldwell, the two men who had been identified by Hassell and Cheong as Tepper's passengers, were arrested after discarding a loaded pistol. They also had one pair of surgical gloves and each wore a stocking mask rolled up under a hat. (Hr. 158 *et seq.*).****

* Neither the license nor the registration were offered into evidence. However, Tepper stipulated that the car with the Virginia license number in question was his. (GX. 33).

** At trial Hassell and Cheong actually testified that one defendant had what looked like a gun and the other had the gloves. (Tr. 44, 101).

*** The officers also looked in the trunk of Tepper's car with Tepper's consent. (H. 132). They found nothing. (H. 133).

**** The police who arrested Bonner and Caldwell had arrived on the scene as a result of the independent reports of a possible bank robbery from the bank manager through the bank's security office. (Hr. 150-51, 188 *et seq.*).

After Bonner and Caldwell were placed under arrest, another police officer found another pair of yellow surgical gloves behind the front seat. He discovered this second pair of gloves on the floor in the back as he was getting into the car to transport Bonner to the First Precinct. (Hr. 163-165; Tr. 626-7). Thereafter, at F.B.I. headquarters, fingerprints were taken from the interior of the car and some materials with fingerprints were seized. (Hr. 219).*

Citing *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1964), and *Chambers v. Maroney*, 399 U.S. 42 (1970), Tepper concedes that a warrantless search of an automobile is justified if probable cause exists. Tepper argues, however, that the information available to police did not amount to probable cause sufficient to justify the search of his car.

In the circumstances of this case the search under the front seat of Tepper's car was reasonable. The police had a car which they had been informed by eyewitnesses looked like a car used in a previous robbery. They knew that two eyewitnesses had seen two individuals leave that car, and approach a bank; one individual carried a gun and another wore gloves. Surely the police had probable cause to arrest Tepper, the getaway driver, and because of the car's mobility and the realistic possibility that Tepper's accomplices at that very moment were committing an armed bank robbery they had the right to search the car.**

* At the suppression hearing, Tepper's counsel indicated his suppression motion did not cover these materials. (Hr. 220).

** As Judge Tenney wrote in denying the suppression motion: ". . . [the police] had reason to believe that [the car] was being used as part of a bank robbery then in progress. The exigencies of the situation left no time to get a search warrant: the car was on the street, one defendant was in it, two others had been seen getting out and were believed to be armed. [Citing *Chambers*, *supra* and *Carroll v. United States*, 267 U.S. 132 (1925).]" *United States v. Caldwell, et al.*, *supra*. (SA. 18).

The Supreme Court has long held that one's expectation of privacy with respect to his car is much less than that with respect to his home. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132, 153-154 (1925). Because of this significantly reduced expectation of privacy and because of the mobility of automobiles, the Court has ruled that a search warrant is unnecessary and a search is permissible where there is probable cause to believe the car contains the instrumentalities or fruits of a crime. *Chambers v. Maroney*, *supra*, 399 U.S. at 48-52; *Carroll v. United States*, *supra*; *United States v. Tramunti*, 513 F.2d 1087, 1104 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).^{*} This principle was recently reaffirmed in *United States v. Chadwick*, 433 U.S. 1 (1977). Here the police had every reason to believe that the getaway car would contain articles the officers were entitled to seize.

The facts of *Chambers*, in which a car search was upheld, match those here. There two citizen witnesses described a getaway car and the clothing of some of its occupants shortly after the robbery of a filling station. Upon seeing the car, the police arrested the men, drove them to the police station and there, for the first time, searched the car. The Court found that the results of that search were obtained properly. The Supreme Court stated:

^{*} In *United States v. Tramunti*, *supra*, 513 F.2d at 1104, this Court upheld the warrantless search of a suitcase found in the defendant's automobile at the time of his arrest. Judge Oakes citing the Supreme Court's opinion in *Chambers v. Maroney*, *supra*, 399 U.S. 42, 48 observed that a different set of rules prevail as to automobile searches "provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize." Undoubtedly the officers in the instant case had more probable cause to believe Tepper's car had articles they would be entitled to seize than the officers in *Tramunti*.

"On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search."

In this case the search was conducted "on the spot" while the police believed a crime was being committed based on information received from citizen-witnesses. The need to conduct a warrantless search in the instant case was far greater than the need to conduct a search some time after the arrest when the car was at the police station.*

Indeed, car searches have been upheld under circumstances far less "exigent" and in cases where there was far less risk that the car would be moved or evidence would be destroyed. A number of cases have upheld searches after the commission of bank robberies when the exigencies involved solving a crime, and not, as here, preventing one. In *United States v. Robinson*, 533 F.2d 578 (D.D.C. 1976) (en banc) Judge Leventhal, writing for the court, found a car search permissible when the suspected getaway car was found several hours after the robbery. There the car had been described by only a single witness who had seen four men trotting toward and getting into the car at about the time she heard sirens. No license plate had been given. Nevertheless,

* The Supreme Court's opinion in *Texas v. White*, 423 U.S. 67 (1975) also makes plain that the search in the instant case was reasonable. In *White* the police received information that a man answering the defendant's description had tried to negotiate several bad checks. The police ordered the defendant to park his car at the curb. A bank employee saw the defendant "stuff" something between the seats. After the defendant was arrested he and his car were driven to the police station where the car was searched. The Supreme Court upheld the search based on the *Chambers v. Maroney*, *supra*, principle that if the police had probable cause to search an automobile at the scene the warrantless search could be conducted later at the station house. See also *Cady v. Dombrowski*, 413 U.S. 433 (1973).

the Court found exigencies "amply justifying" the police in searching the car. *Id.* at 584. See *United States v. Shye*, 473 F.2d 1061 (6th Cir. 1973) and *United States v. Beck*, 511 F.2d 997, 1001 (6th Cir.), *cert. denied*, 423 U.S. 836 (1976).

The police in this case faced far more serious exigencies than those held sufficient in this latter line of cases. Here, of course, rather than occurring shortly after a robbery the initial search occurred *during* the attempt. Suspects were at large and correctly believed to be armed. The police had strong reason to believe that they had found the getaway car. Immediate entry was necessary not only to continue a "promising police investigation" but also to help protect the citizens in the area and the police themselves. *United States v. Robinson*, *supra*, 533 F.2d at 584.*

Naturally, given these exigent circumstances the later entries into the car, first to transport the defendant to the police station and then to dust the car for fingerprints were justified under the consistently upheld *Chambers* reasoning that such a search is no more intrusive than holding the car pending the granting of a warrant. *Chambers v. Maroney*, *supra*, 399 U.S. at 51-2; *Texas v. White*, 423 U.S. 67 (1975); *Coolidge v. New Hampshire*,

* Alternatively Judge Tenney found that the search was incident to a lawful arrest. There can be no doubt that there was probable cause to believe that Tepper was the getaway driver in a plan to rob the bank. Arrests for far less serious offenses, including traffic offenses, have been found to justify personal searches. See *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Ricard*, 563 F.2d 45, 48-49 (2d Cir. 1977); *United States v. Williams*, 526 F.2d 1000 (6th Cir. 1975) (where the suspects were, as is usual, handcuffed and removed from the car before the search was made). In the instant case the car had to be searched for weapons because at least one of the defendants—Bonner—was transported back to the station house in the getaway vehicle.

403 U.S. 443, 463 n.20 (1970); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976); *United States v. Jenkins*, 496 F.2d 57, 73 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Carneglia*, 468 F.2d 1084, 1089-90 (2d Cir. 1972), *cert. denied sub nom.*, *Inzerillo v. United States*, 410 U.S. 945 (1973). Cf. *United States v. Edwards*, 415 U.S. 800 (1974). As the Court noted in *Coolidge*, *supra*, 403 U.S. at 463 n.20, "given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station."

The second pair of gloves found on the back floor of the car was inadvertently discovered in plain view. *Harris v. United States*, 390 U.S. 234 (1968); *Ker v. California*, 374 U.S. 23, 42-43 (1963). Consistent with the plain view doctrine (1) the officer's initial entry into the vehicle was lawful, (2) his discovery was inadvertent and (3) the incriminating nature of the gloves was immediately apparent. See *United States v. Wilson*, 524 F.2d 595, 598 (8th Cir. 1975), *cert. denied*, 424 U.S. 945 (1976); *United States ex rel. LaBelle v. LaVallee*, *supra*. Here the policeman discovered the gloves while getting into the back seat of the car in order to transport the defendant Bonner back to the police station. Thus, the entry into the car in order to remove it from the public streets and to transport one of the defendants was lawful. Pursuant to the lawful entry evidence of an obviously incriminating nature in a bank robbery case was inadvertently discovered. Indeed, this Court has recently upheld the plain view seizure of materials in an automobile under

* The fingerprints, which were the only materials seized in the stationhouse search and offered at trial, were not clearly made a part of *Tepper's* motion to suppress. (Hr. 220). In fact, no attack on this search has been made on appeal. Moreover, the only purpose of offering those fingerprints was to show that both *Tepper* and *Bonner* had been in *Tepper's* car—a matter admitted by *Tepper* after his arrest and never seriously disputed at Trial.

just the circumstances present here. *United States v. Variano*, 550 F.2d 1330 (2d Cir. 1977), *cert. denied*, — U.S. — (1978).

Finally, recognizing that the information given to the police by the citizen-eyewitnesses was sufficient to establish probable cause for both the arrest and the search, Tepper makes the meritless claim that the information of the witnesses was not reliable and trustworthy. This argument utterly ignores the well established principle that reports of victims or of witnesses to crimes are inherently trustworthy and require no corroboration or independent indicia of reliability. *United States v. Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Rueda*, 549 F.2d 865, 869 (2d Cir. 1977).

POINT IV

The Admission Into Evidence Of Photographs Of Caldwell Was Entirely Proper And Did Not Prejudice Tepper.

Tepper but not Caldwell argues that his conviction should be reversed because one of the several pictures of Caldwell introduced at trial was a "mug shot." (GX 22F) Since the jury was informed several times that all of those pictures were taken at the time of Caldwell's arrest *on this case*, neither Caldwell nor Tepper was prejudiced by the admission of this picture. Indeed since Caldwell's picture was admitted at trial, and he does not complain about its admissibility, we fail to understand how Tepper possibly could be prejudiced.

Government's Exhibit 22F, a front and side view picture of Caldwell, was one of six similar photographs in a spread shown to Frank Leavey, the bank manager. All criminal identification numbers in the exhibit were obliterated by tape. On direct examination, Leavey iden-

tified Caldwell in Court as the first man who came into the bank. On redirect examination, he testified that when he was shown the photo spread he picked Government's Exhibit 22F as a picture of the second man who entered the bank. (Tr. 214-17).^{*} At the time of the admission of the photograph and later in the testimony of an F.B.I. agent, the jury was told that this picture was taken after Caldwell's arrest on this case. (Tr. 217, 514-15)

Therefore, though it was in the form of a mug shot, the picture in no way suggested that Caldwell had a criminal record. This suggestion is the only recognized ground for finding prejudice for the admission of such pictures. *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973). Indeed, in *United States v. Calarco*, 424 F.2d 657 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970), the Court held that, when "doctored,"^{**} photographs taken from police files were not prejudicial because the jury might well have inferred that the photographs were taken at the time the defendants were arrested on the case *sub judice*. In that case, as here, there were no incidents during the introduction of the picture to arouse the jury's suspicions about the possible source of the photographs. In fact, here the jury knew the source.

Not only was any cause for concern about jury speculation eliminated by direct statements to the jury about the non-prejudicial source of the photographs, but this Circuit's three-part test for photographs that do suggest a prior criminal record supports the admission of this evidence. *United States v. Harrington*, *supra*, 490 F.2d at

^{*} Of course, the evidence of this prior identification was properly admissible under Rule 801(d)(1)(c), Fed. R. Evidence.

^{**} The "doctoring" consisted of the removal of written material on the back of the exhibit and the incriminating numbers. Here the only writing on the back was Leavy's. Id.; *United States v. Harrington*, 490 F.2d *supra* at 491-2.

494. The Government had a need to introduce the photograph (to attempt to refresh the witness's recollection and clear up his testimony); it eliminated any possible implication of a prior criminal record; and it did not in the manner of its introduction of the evidence suggest in any way that Caldwell had any prior record. The photograph surely did not suggest that Tepper had a criminal record.

POINT V

The District Court Properly Denied Tepper's Motion For A Severance.

Tepper contends that the trial court erred in denying his motion for a severance from Caldwell. Tepper contends that the admission of Caldwell's post-arrest statements at their joint trial violated the rule enunciated in *Bruton v. United States*, 391 U.S. 123 (1968). Once the post-arrest statements of Caldwell and Tepper are examined, it is apparent that Tepper's severance claim is without merit.

The only reference to Tepper in any of the brief testimony about Caldwell's post-arrest statements concerned the early portion of his interview at F.B.I. headquarters:

A. . . . [Caldwell] indicated that . . . on his way to [a public school playground in Queens] he ran into, or met Mr. Tepper and Mr. Bonner, who were driving in a vehicle.

Q. Did he describe the vehicle, sir?

A. No.

Q. Did he say whose vehicle it was?

A. Yes, it was Mr. Tepper's.

Q. Did he say what happened after he met these men?

A. Yes, he said that they discussed going to Manhattan and going to uptown Manhattan, the Harlem area, where they were going to the Islamic Temple

Q. And thereafter, what did he tell you, sir?

A. He got into the vehicle, in the rear seat, and Mr. Tepper, the driver, drove into Manhattan via the Queens Midtown Tunnel. They proceeded to the lower Manhattan area where they drove around for a brief period of time.

Q. Then what did he say happened?

A. He said in the area of Canal Street and Broadway Mr. Bonner indicated to Mr. Tepper, the driver, that he wanted to get out of the vehicle, and check something out, but Mr. Caldwell stated he wasn't aware of what Mr. Bonner wanted to look into.

Q. Did he say what happened then?

A. He said Mr. Tepper stopped the vehicle and let Mr. Bonner and himself out of the vehicle. . . .

Q. Then what did he tell you, sir?

A. . . . [he and Bonner] decided to rejoin Mr. Tepper at his vehicle, which was parked in the vicinity. They headed towards the vehicle, along Canal Street, and they turned off the Canal Street up Mercer Street, and there they observed Mr. Tepper talking to police officers from the New York City Police Department. (Tr. 648-50).

The evidence of Tepper's post-arrest statements was far more extensive. The latter part of those statements were offered as false exculpatory statements, but the relevant portion of those statements overlapped the statements of Caldwell. The F.B.I. agent who conducted the interview gave the following testimony:

Q. Tell us what happened during that interview?

A. I questioned Mr. Tepper concerning his activities of the day. I asked him if he was indeed in the area of the bank, what he was doing there.

Q. What response did you get?

A. Mr. Tepper told me that he and his companions were killing some time driving around, that they drove into lower Manhattan, and that at this time he said he knew nothing of a bank robbery or an attempted bank robbery.

Q. Did he say who his friends were?

A. Mr. Caldwell and Mr. Bonner.

Q. Did he give you a name for Mr. Caldwell other than the name Caldwell?

A. Yes, he did.

Q. What was the name?

A. I believe it was "Sha". I'm not certain, but I believe that is the name he gave.

Q. By the way, did he give you a name for himself other than Ernest George Tepper?

MR. GAFFIN: I object as leading at this point.

THE COURT. Overruled.

Q. You may answer the question.

A. I believe he told me his name was "Born Freedom".

Q. Did he indicate to you anything about what happened in the area of the bank?

A. Yes, he said that the two people he was with wanted to get out of the car for something, he didn't know what. He said he stopped the car. His friends got out of the car, that he was alone for what he estimated to be about 20 minutes, and

then he was confronted by police officers who told him that he was going to be under arrest.* (Tr. 511-12).

Tepper correctly notes that *Bruton v. United States*, *supra*, requires reversal only if the post-arrest statement about the co-defendant is clearly inculpatory as to the complaining co-defendant and vital to the government's case. *United States v. Sacco*, 563 F.2d 552, 556 (2d Cir. 1977), *cert. denied*, 98 S.Ct. 779 (1978); *United States v. Wingate*, 520 F.2d 309, 313 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Cassino*, 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). It is clear that the statement of Caldwell, insofar as it involved Tepper, was not clearly inculpatory of Tepper and was not vital to the Government's case. Caldwell's statements were essentially exculpatory and were of little consequence in light of the eye-witness testimony and circumstantial evidence linking Caldwell and Bonner to Tepper. Furthermore, Caldwell's statement about Tepper only helped to establish that Caldwell, Tepper, and Bonner had driven into lower Manhattan, that Caldwell and Bonner left the car, and that Caldwell later saw Tepper talking to the police. Since Tepper never disputed these facts at the trial, Caldwell's statements were hardly incriminatory and vital to the Government's case.

Finally, the only portions of Caldwell's statement in issue here, the portions referring to Tepper, overlapped the more extensive post arrest statements of Tepper. At most, both statements established what the other proof in the trial clearly showed—only that the defendants were together. In such cases this Circuit has consistently

* The following day, according to a different F.B.I. agent, Tepper said "that he had gone downtown with the other two gentlemen, he said to buy a glass, to fix a broken window in a house." (Tr. 567).

held that no severance is required. *United States v. Toliver*, Dkt. Nos. 77-1017, 2055, slip op. 863 877 (2d Cir. January 3, 1978); *United States ex rel. Stainbridge v. Zelker*, 514 F.2d 45 (2d Cir. 1975), *cert. denied*, 423 U.S. 872 (1975); *United States ex rel. Ortiz v. Fritz*, 476 F.2d 37 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973); *United States ex rel. Catanzaro v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Lee S. Richards being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the *6th* day of *April*
1978, he served ~~a copy~~ ^{two copies} of the within brief
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36 West 44th Street
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Lee S. Richards III

Sworn to before me this
day of *April*, 1978

Jeannette Ann Grayeb
JEANNETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

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COUNTY OF NEW YORK) ss.:

Lee S. Richards, being duly sworn,
deposes and says that he is employed in the office of
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of New York.

That on the 6th day of April, 1978,
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Lee S. Richards, III

Sworn to before me this

6th day of *April*, 1978

Jeanette Ann Graye
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